

**SOAH DOCKET NO. 582-10-4184
TCEQ DOCKET NO. 2005-1490-WR**

CONCERNING THE APPLICATION	§ BEFORE THE STATE OFFICE
	§
BY THE BRAZOS RIVER	§
AUTHORITY FOR WATER USE	§ OF
PERMIT NO. 5851 AND RELATED	§
FILINGS	§ ADMINISTRATIVE HEARINGS

**THE DOW CHEMICAL COMPANY’S RESPONSE
TO EXCEPTIONS TO PROPOSAL FOR DECISION**

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW The Dow Chemical Company (“Dow”), and files this, its Response to Exceptions to the Administrative Law Judges’ (“ALJs”) Proposal for Decision (“PFD”) regarding the above-referenced application (“Application”) by Brazos River Authority (“BRA” or “Applicant”) for Water Use Permit No. 5851, and would show the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) as follows:

**I.
INTRODUCTION**

BRA’s System Operation (“SysOp”) Permit Application (“Application”) is an application for BRA to acquire an additional water right containing most of the remaining yield of the Brazos River Basin. The water availability analysis¹ that supports BRA’s Application uses faulty assumptions. Because of the use of these faulty assumptions,

¹ The water availability analysis for the Application was performed by applying the TCEQ’s Water Availability Model (“WAM”) for the Brazos River Basin. The dual simulation feature of the WAM was engaged to simulate the operation of BRA’s existing water rights in the first pass and to evaluate water availability of the proposed water right in the second pass. Actually four different models were used to analyze water availability for the SysOp Permit: one simulates all of BRA’s diversions of water (water available under BRA’s existing water rights and the proposed water right) from the Brazos River at Glen Rose; one simulates all of BRA’s diversions of water from the Brazos River at Highbank; one simulates the

BRA's evidence failed to meet its burden of proof required to enable the TCEQ to grant BRA's Application.

The fundamental problem with BRA's Application is that BRA seeks a water right that it did not support with the evidence required by the Texas Water Code. BRA failed to satisfy its burden under the Texas Water Code to establish: (1) that there is sufficient unappropriated water available to support the Application; (2) that all of the water to be appropriated will be put to beneficial use; (3) that the Application will not impair existing water rights; and (4) that the Application is not detrimental to the public welfare. *See* TEXAS WATER CODE § 11.134. None of the evidence in the record and no theory or analysis proposed by BRA, the Executive Director ("ED"), nor even the ALJs in the PFD resolve the numerous places that BRA's Application simply fails to meet the minimum evidentiary requirements set by the Texas Legislature before TCEQ is authorized to grant an applicant a right to appropriate state water. Dismissal of the Application is TCEQ's only tenable resolution on BRA's Application record that follows the statutory requirements for appropriating Texas water.

The primary dispute in this permitting matter is whether the TCEQ can appropriate water to an applicant without a record that proves the applicant meets the requirements in the Texas Water Code. The Applicant and the ED primarily used a WAM to attempt to generate evidence supporting the Application. Dow does not dispute that the results of the model chosen support this Application. However, the results of the model chosen are only a mathematical rearrangement of the assumptions and data used in

diversion of all water at the Brazos River at Richmond; and one simulates all of BRA's diversions of water from the Brazos River at the Gulf of Mexico. The problems with the water availability analysis are common to all four models. For simplicity, Dow will discuss the issues with regard to the model that assumes all of BRA's diversions of water will occur from the Brazos River at Richmond.

the model. The results cannot be given any evidentiary weight if the assumptions and data are inaccurate. To support this logical tenant, hypothetically consider a case where the ED and Applicant used a model that assumed that rain occurred each day at the 50-year average rate and all the other assumptions and data were completely accurate. This model would predict that there was a tremendous amount of water available in the Brazos River. However, these hypothetical model results would need to be completely ignored, as the results are as flawed as is the assumption upon which the model relied to predict the real world. There is also no basis for anyone to consider a model more acceptable if it has a history of use. The Commission should not listen to an attempt to undermine the evidentiary rules by saying that a type of inadmissible evidence was allowed in a different proceeding. The rules of evidence need to be evaluated on the basis of what is in the record, the current objection and any proffering. The laws of the Texas Water Code require nothing less than full consideration of their requirements against the current record. This consideration will fail to show that BRA met its statutory burden in the following areas because of the lack of realistic model assumptions.² Rather than using realistic assumptions, the model was constructed using hypothetical assumptions, which are inaccurate based on the evidence produced in the hearing. The primary deficiencies with the model used by BRA and the ED are: (1) ignoring the location of BRA's long-term contract demands; (2) ignoring the fact that BRA's existing reservoirs do not currently have the same storage capacity as authorized by the associated BRA water rights; and (3) assuming that the estimated amount of return flows developed for the Brazos G regional water plan for the year 2060 would be available for purposes of the

² As will be discussed later, Dow believes that the model used to evaluate the Application, the dual-sim WAM, should be modified to allow it to use permitted reservoir storage volume for the first pass to

Application.

During the hearing, it was admitted by BRA witnesses that these excursions from reality were in fact assumed for analyzing the Application, that they can result in appropriating water for the SysOp Permit that is already appropriated to existing water rights, and that only enforcement of priority prevents injury to existing water rights. *See Tr. Pg. 672, Lns. 9-12.* Also, there is no basis in the record to support a contention that, in the absence of a watermaster or streamflow condition, the water right sought by BRA can be operated without injury to other water rights. Since a watermaster and streamflow conditions are not part of BRA's Application, denial is the only tenable option for TCEQ. There are additional problems from BRA's and ED's reliance on a model relying on unrealistic assumptions. There is no proof in the record that all of the water that BRA seeks will be beneficially used. Additionally, BRA will tie up water, making it unavailable for any other user in Texas, which is detrimental to the public welfare.

II.

BRA'S WATER AVAILABILITY ANALYSIS

A. Location of Diversion Points

BRA's water availability analysis assumes all of the water used by BRA under authority of its existing water rights and the proposed SysOp Permit will be taken at one of the theoretical control points. BRA acknowledged that if water is taken upstream of this theoretical control point, their model will predict less water is available. *Tr. Pg. 287, Lns. 16-21; Tr. Pg. 648, Lns. 9-14.* BRA witnesses acknowledged that BRA's provision of water to its major contractual customers will likely continue in the future. *Tr. Pg. 83, Ln. 21-Pg. 84, Ln. 3.* Dr. Robert Brandes testified that if BRA continues to serve its

existing major customers, the amount of water available under the SysOp Permit at the Richmond Gage is reduced by approximately 55,600 acre-feet per year (“af/y”), confirming and providing a measure of the lack of BRA’s model because of this one inaccurate assumption. **See Exhibit Dow 19 at 17, Lns. 12-15.** Under cross-examination, Dr. Brandes stated that he does not know of a single example of a water availability analysis where the authorized diversion points for existing water rights were modeled at a single diversion point located much further downstream in the basin as was done for the BRA SysOp Permit Application. **See Tr. Pg. 1563, Lns. 10-14.**³ This approach to modeling the SysOp Application appears to be no more than an attempt to artificially maximize the available supply of unappropriated water for the SysOp Permit. BRA’s witness, Mr. Gooch, acknowledged that yield of the SysOp Permit in the future is likely to be consistent with the results of the Brazos G Analysis, which is very similar to the results obtained by Dr. Brandes. **See Tr. Pg. 390, Ln. 19 – Pg. 392, Ln. 13.** This inaccuracy, far from a necessary modeling inaccuracy, appears to be an attempt for BRA to appropriate more water than is actually available.

B. Reservoir Storage

The water availability analysis for BRA’s SysOp Permit Application is also flawed by the fact that the permitted storage in BRA’s existing reservoirs was used for assessing water availability for the new water right, when in reality the actual storage available in BRA’s reservoirs is substantially less than the permitted storage of BRA’s reservoirs. Dow agrees with the ED that the permitted storage is appropriate to use when analyzing water availability for BRA’s existing water rights. Dow, however, believes it

³ Note that Dr. Brandes testified that he is particularly familiar with the water management plan of the Lower Colorado River Authority for Lake Travis and Lake Buchanan.

is improper to use the permitted storage for analyzing the available supply of water for BRA's new SysOp water right because it will overestimate the unappropriated water available for the new water right. **See Tr. Pg. 1570, Lns. 8-18.** In his analysis of the impact of reservoir storage on the system operation yield, Dr. Brandes used the actual reservoir storage for both the first and second passes of the dual-sim WAM simulation. He did this because the dual-sim WAM as structured for analyzing the BRA SysOp Permit does not have the capability to use different storage amounts for the two passes. **See Tr. Pg. 1606, Ln. 16-Pg. 1607, Ln. 11.** Dr. Brandes testified that using existing storage in the dual-sim WAM reduces the firm water available to the SysOp Permit by approximately 33,000 af/y from that determined with the model using permitted storage. **See Tr. Pg. 1586, Lns. 3-12.** Dr. Brandes acknowledged that the yield impact would be somewhat less if the permitted storage was used in the first pass of the dual-sim WAM and existing storage was used in the second pass. **See Tr. Pg. 1606, Ln. 16 – Pg. 1607, Ln. 11.** The ALJ's agreed with Dow on this issue. **See PFD at 49-53.**

C. Return Flows

BRA excepts to the ALJs recommendation regarding return flows. BRA contends that the Commission is now presented with three alternatives for handling return flows, which include treating the appropriation of return flows in one of the following ways: (1) as a bed and banks authorization, as reflected by the ED's Draft Permit; (2) as a new appropriation, as reflected by the BRA draft permit; or (3) as a combination of the two, as reflected by the PFD. **See BRA's Exceptions at 8-9.** BRA argues that it should be allowed to appropriate the 2060 return flows because under Section 11.046(c) of the Texas Water Code, return flows following discharge into a watercourse and mingling

with other state water becomes state water available for appropriation. *See BRA's Exceptions at 17.* While Dow agrees with BRA (and the ALJs) that return flows are available for appropriation by others once they reenter the watercourse, Dow disagrees that BRA made the necessary showings under the law to appropriate the return flows it seeks in its Application.

Dow contends that while the language in Section 11.046(c) of the Texas Water Code appears to subject return flows discharged to a watercourse to appropriation by others, meaning these return flows might be subject to appropriation by a third person, any appropriator still has to make all of the showings with respect to these return flows required of an appropriation under TEX. WATER CODE §§ 11.124, 11.125, 11.128, 11.134, 11.147 and 11.150. All BRA has done in this case, in support of its appropriation of return flows, is to request all of the 2060 return flows listed in the state water plan. The mere fact that return flows are listed in a water plan does little to prove that these projected return flows will ever actually exist. The ALJs can take judicial notice of the fact that all aspects of governmental plans in general and state water plans in particular are not always realized. BRA simply has not met its burden of proof that these will ever exist simply by relying on the fact that they are listed in a state water plan. Basing an appropriation solely on figures in the state water plan is too speculative, and if it turns out that these 2060 return flow numbers are overstated, senior water rights will be impaired. It is Dow's position that on a proper showing under Section 11.134 of Texas Water Code, and other statutes, that BRA could appropriate return flows, but BRA has made an insufficient showing to be granted an appropriation of return flows that are not based on BRA water rights, BRA discharges, or return flow rights assigned to BRA.

During the hearing, the ED argued that BRA can only appropriate return flows resulting from use of water under BRA's water right, water that is discharged from a BRA wastewater treatment plant, or pursuant to an assignment from a third-party that holds the rights to the return flows. Dow supported the position of the ED not because it agreed with the ED's interpretation of Section 11.046(c) of the Texas Water Code, but because BRA's sole reliance on the state water plan was insufficient to allow BRA to appropriate all the return flows listed in the water plan as being available by the year 2060. BRA's appropriation of return flows should therefore be limited to appropriation of return flows resulting from the use of BRA water, water discharged from BRA's wastewater treatment plants, or return flows assigned to BRA from a third-party holding the right to the return flows has the necessary certainty to be subject to the appropriation.

III. **"TWO-STEP" PERMITTING PROCESS**

An inordinate amount of attention has been focused on the so-called "two-step" permitting process. Dow believes that the major focus should be on compliance with statutes in the Texas Water Code regarding the appropriation of water. Statutes and their requirements do not change based on Applicant or ED suggestions. Dow also believes that the "two-step" process advocated by BRA and the ED is unprecedented and does not meet the requirements of the Texas Water Code. As Dow understands it, what BRA desires TCEQ to do is to issue its SysOp Permit without BRA presenting evidence to support all the required findings for issuing a water right. BRA states "[t]his appropriation would define the water right for purposes of operation, modeling, and future permitting." **See BRA's Exceptions at 4.** As shown below, based on the record, issuing the appropriation would result in BRA obtaining a new water right for 188,005

af/y of firm water, of which approximately 88,600 af/y will not be able to be used by BRA. This same amount of water will no longer be "unappropriated;" therefore, it will be unavailable to any other potential water rights applicant forever.

BRA seems to argue that the current drought is the reason for the TCEQ to proceed forward with some version of the "two-step" process. Dow disagrees. Dow believes that if the Commission were to take the current drought into consideration at all in this docket, it should not be for supporting the issuance of this permit. Instead, the focus should be on whether the existing Brazos River Basin water rights are capable of being managed during a drought situation without the establishment of a watermaster or imposition of streamflow restrictions.⁴ The drought does demonstrate the harm that may be done if water rights are issued based on a flawed model, such as the one used by BRA that overstates the amount of water that is available. Another consideration would be whether the proposed new water right would be of much benefit during the ongoing drought. It appears that senior water rights are having trouble getting the water they need. This could either be because prior appropriation is not being followed, or that there is just a lack of water. If it is the latter, because of the type of water sought by the Application – inflows downstream of BRA reservoirs, additional yield from storage in BRA reservoirs, and return flows – the proposed water right may not yield much water during drought conditions. During a drought, the amount of inflows and return flows exceeding the needs of holders of existing water rights will likely be substantially reduced. It is unlikely there would be a significant amount of additional yield during a drought from storage and BRA's reservoirs when one takes into account the physical

⁴ Note that one of Dow's experts, Dr. Robert Brandes, opined that the current drought illustrates the need for a watermaster for the Brazos River. He also opined that the BRA SysOp Permit would only increase that need. *See Tr. Pg. 1559 Ln. 14 – Pg. 1561, Ln. 6.*

ability of the reservoirs to store water in excess of their existing water rights.

Likewise, the ED suggests that the trend towards lesser amounts of available water for appropriation requires that applications be more complex and allow for more flexibility. **See ED's Exceptions at 1.** Dow would counter that this Application appears to remove from future availability approximately 88,600 af/y of water with that water being of no benefit to BRA and not meeting the Texas Water Code's requirement that appropriated water be shown to be beneficially used. Also, if more flexibility is needed, it would seem that the preferable way to address that would be by amending the Texas Water Code rather than engaging in an ad hoc procedure in a permit hearing.

A. An Interim Order is Not Authorized by the Texas Water Code

In the PFD, "the ALJs conclude that there is no precedent in water rights permitting in Texas which supports the use of the two-step process envisioned by BRA and the ED." **See PFD at 165.** However, BRA contends that "another vehicle exists by which the ALJs' issues with the two-step process might be addressed. That vehicle is an interim order of the Commission, defining the downstream appropriation of the System Operation Permit." **See BRA's Exceptions at 5.** BRA argues that there is legal authority for such an interim order. Specifically, BRA states that "[t]he commission has authority pursuant to Texas Water Code §§ 5.102, 5.116, and 11.133 to issue an interim order regarding certain factual and legal issues in a case." **See BRA's Exceptions at 5.** However, if one actually reviews these statutes that BRA cites as justification for an interim order, it is clear that they in no way authorize this type of action. TEX. WATER CODE § 5.102 provides that:

“(a) The commission has the powers to perform any acts whether specifically authorized by this code or other law or implied by this code or other law, necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws.

(b) The commission may call and hold hearings, receive evidence at hearings, administer oaths, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact and decisions with respect to its jurisdiction under this code and other laws and rules, orders, permits, licenses, certificates, and other actions adopted, issued, or taken by the commission.”

This statute simply outlines the breadth of the TCEQ’s general powers, stating that the Commission can perform any act “specifically authorized” or “implied” by the Texas Water Code, or other law. Unfortunately for BRA, no provision in the Texas Water Code, or other law, specifically authorizes this type of interim order, and none can be interpreted to impliedly authorize this type of action for a water use permit application.

Section 5.116 of the Texas Water Code, cited by BRA, also does not provide authority for an interim order. This section only states that “[t]he commission may recess any hearing or examination from time to time and from place to place.” TEX. WATER CODE § 5.116. This provision does not even relate to interim orders and only allows the TCEQ to recess hearings or examinations. Like Section 5.116, Section 11.133 of the Texas Water Code only deals with general TCEQ hearing procedures. This section states the following:

“At the time and place stated in the notice, the commission shall hold a hearing on the application. Any person may appear at the hearing in person or by attorney or may enter his appearance in writing. Any person who appears may present objection to the issuance of the permit. The commission may receive evidence, orally or by affidavit, in support of or in opposition to the issuance of the permit, and it may hear arguments.”

This statute only generally lays out TCEQ hearing procedures. None of these statutes

that BRA cites in any way authorize what BRA is requesting in this case, an interim order ruling only on certain aspects of the case after the evidentiary hearing is complete. By requesting this broad (and incorrect) reading of the Texas Water Code, BRA attempts to change the law to fit its Application; instead, BRA should have changed its Application to fit the law.

BRA also argues, “utilizing an interim order would be much like consideration and entry of an order in response to certified questions.” **See BRA’s Exceptions at 5.** The TCEQ’s regulations provide that a judge may certify a question to the Commission “regarding commission policy, jurisdiction, or the imposition of any sanction by the judge which would substantially impair a party’s ability to present its case.” 30 TEX. ADMIN. CODE § 80.131(B). BRA contends that entry of an order in response to certified questions is similar to the interim order it now requests, but BRA conveniently ignores the procedural prerequisites that are required for certified questions. For a certified question, the judge must file a request to answer the certified question with the chief clerk and serve copies on the parties, the parties are allowed to file briefs and replies, and then the request may be scheduled for consideration during a Commission meeting. 30 TEX. ADMIN. CODE § 80.131(C). The ALJs did not file a request for an interim order in this case, and the parties will not be allowed to specifically brief the questions associated with this interim order, so the procedure BRA is requesting would not be similar to the certified question procedures at all.

Chapter 11 of the Texas Water Code, Subchapter D, is very specific on procedures that must be followed in order for a water use permit to be granted. The Texas Water Code specifically states what uses require permits or amendments (Sections

11.121-11.122), what information must be included in permit applications (Sections 11.124-11.128), and how applications are reviewed, noticed and issued by TCEQ (Sections 11.129-11.135). BRA attempts to deviate from these specific procedures not because its Application is so complex, as BRA claims, but because its Application is deficient. Simply put, nothing in the Texas Water Code specifically or impliedly authorizes this interim order that BRA now requests.

B. An Interim Order Does Not Solve the Statutory Issues

BRA claims that “[i]f the Protestants and the ALJs are correct in their legal analysis, we are presented with a classic ‘chicken and egg’ conundrum.” **See BRA’s Exceptions at 1.** There is indeed a "chicken or the egg" conundrum, but it cannot be blamed on the Protestants or the ALJs. It is caused by the nature of BRA’s Application and the modeling supporting it. Instead of developing a water availability model that demonstrates that BRA can appropriate a certain amount of water (unappropriated water), BRA performed a water availability analysis using assumptions that do not match the real world. BRA claims it is entitled to an appropriation of 188,005 af/y. This amount of yield can only be generated if: (1) BRA takes all of the water at or below the Richmond Gage, (2) BRA’s reservoir storage is equal to the permitted volumes, and (3) BRA is allowed to appropriate return flows listed in the water plan as being available in the year 2060.

BRA is unlikely to ever divert all of the water at the Richmond Gage to meet its customer demands. BRA acknowledged that it has significant long-term contracts that require water deliveries upstream of the Brazos River at Richmond. **Tr. Pg. 82, Ln. 22-Pg. 83, Ln. 1.** The only evidence in the record is that BRA’s diversions at these

upstream locations will continue. **Tr. Pg. 83, Ln. 21-Pg. 84, Ln. 3.** BRA witnesses acknowledged that actually making all diversions from the Brazos River at Richmond is unlikely. **Tr. Pg. 80, Ln. 19-Pg. 84, Ln. 3 (Mr. Forte); Tr. Pg. 574, Lns. 6-13 (Dr. Wurbs); Tr. Pg. 300, Lns. 9-12 (Mr. Gooch).** BRA witnesses also testified that making diversions at points upstream from the theoretical diversion point (the Richmond Gage) reduces the yield of the BRA SysOp Permit. **Tr. Pg. 287, Lns. 16-21 (Mr. Gooch)**⁵.

Additionally, Dow proved that the existing storage of BRA's reservoirs is much less than the permitted storage. **See Exhibit Dow 27.** BRA witnesses admitted that the permitted storage of BRA's reservoirs, and not the existing storage, was used to model BRA's SysOp Permit. **Tr. Pg. 266, Ln. 11- Pg. 267, Ln. 15.** BRA witnesses also admitted that since the permitted storage capacity was used instead of the lower existing storage, the yield BRA is requesting exceeds the actual amount of unappropriated water available. **Tr. Pg. 673, Ln. 24.**

Again, BRA seeks to appropriate 188,005 af/y of water on a firm basis.⁶ Dow experts determined that if one takes into account the actual location of BRA's existing demands, which BRA admitted are not likely to go away, the amount of water available under the SysOp Permit Application is reduced by approximately 55,600 af/y. **See Exhibit Dow 19 at 17, Lns. 12-15.** Using the actual storage capacity of BRA's

⁵ In this proceeding, the burden of proof is on BRA by a preponderance of the evidence. 30 TEX. ADMIN. CODE § 80.17 (2011) (Tex. Comm'n on Env'tl. Quality, Burden of Proof). As such, BRA had the burden to prove by a preponderance of the evidence that unappropriated water is available to satisfy the amounts requested in its Application, and that its proposed Application is intended for beneficial use, does not impair existing water rights, and is not detrimental to the public welfare. See TEX. WATER CODE § 11.134. This testimony by BRA is the very antithesis of that. BRA's witnesses consistently testified that what was modeled in the Application (making all diversions from the Brazos River at Richmond) will never actually happen in the real world.

⁶ This is the amount in the ED's preferred permit attached to the PFD for the firm diversion at Richmond after Allens Creek is online.

reservoirs in the dual-sim WAM model further reduces the amount of water available under the SysOp Permit Application by approximately 33,000 af/y. **Tr. Pg. 1586, Lns. 3-12.** This means that approximately 88,600 af/y (55,600+33,000) of the 188,005 af/y that BRA seeks to have appropriated are not proven to be available by the evidence presented in the hearing. Said differently, only 99,405 af/y (or 53%) of the 188,005 af/y of the water that BRA would have the TCEQ appropriate to it would actually be available to BRA. This means that 88,600 af/y (47%) of the 188,005 af/y that BRA seeks to appropriate would be in a water rights “limbo.” It would not be available for BRA’s use, and it would not be available for appropriation by others either.

The Application, as a result of this “limbo” water, does create a “chicken or the egg” conundrum, albeit not the one BRA suggests. Due to the inaccurate assumptions in the water availability modeling, if BRA is granted a permit for the amount it is requesting, one of two events will occur: (1) BRA will only use 99,405 af/y out of the 188,005 af/y granted in the permit, meaning BRA will never beneficially use 47% of the water it has been appropriated; or (2) BRA will use 188,005 af/y, which only 99,405 af/y would be actually available in the real world, meaning that BRA will be taking water from and impairing existing water rights in the Brazos River Basin. If it is the former, BRA is violating Section 11.134(b)(3)(A) of the Texas Water Code, because a large portion of BRA’s appropriation will never be beneficially used; if it the latter, BRA is violating Section 11.134(b)(3)(B) of the Texas Water Code, because its appropriation will impair existing water rights. Dow is not sure which statutory violation will come first, the chicken (lack of beneficial use) or the egg (impairment of existing water rights), but one will occur.

BRA's interim order suggestion/option does not solve this "chicken or the egg" issue. BRA now suggests that the Commission grant an interim order to resolve "the amount of water appropriated at one or more of the 'control points' (BRA recommends the Richmond gage – one of the control points examined)." **See BRA's Exceptions at 2.** Once the amount of water BRA has requested at the control point is appropriated to BRA by the interim order, a statutory violation is still guaranteed to occur. Either BRA will never beneficially use a large portion of the water appropriated under the interim order, or BRA will impair existing water rights by using more water than is actually available.

C. Unappropriated Water

As detailed above, the assumptions that BRA used regarding the location of the diversions points and the amount of storage available to the new SysOp water right causes an overestimation of available unappropriated water. BRA's modeling indicated that there is adequate unappropriated water to support an appropriation with a firm yield of 188,005 af/y at the Richmond Gage. When correcting for the location of BRA's current contractual diversions, there is only sufficient unappropriated water to support a firm diversion of 132,405 af/y year at the Richmond Gage. The amount of unappropriated water is further reduced when one takes into account the actual amount of storage available for the new water right. BRA's evidence, therefore, fails to show that there is sufficient unappropriated water to support the appropriation of 188,005 af/y on a firm basis at the Richmond Gage, in violation of Section 11.134(b)(2) of the Texas Water Code. Nothing proposed by BRA or the ED would alleviate the lack of unappropriated water for the proposed appropriation.

D. Injury to Water Rights

In describing its position regarding going forward in the hearing, BRA states that the initial step will define the appropriation for its system operation. **See BRA's Exceptions at 4.** It appears that BRA wants to appropriate the full amount of 188,005 af/y at the Richmond Gage. Obviously, if BRA diverts 188,005 af/y year during the critical period when there is insufficient unappropriated water to support that magnitude of diversion, it is likely that injury to existing water rights will occur. BRA has not explained how an interim order would alleviate this problem.

BRA and the ED contend that the fact that the proposed water right will have a junior priority prevents injury to existing water rights. While this may be true in other situations, the evidence in this case indicates the contrary. It takes BRA 30 days to determine the amount of inflows to one of its reservoirs. **See Tr. Pg. 1085, Ln. 17 – Pg. 1086, Ln. 15.** BRA admitted, in absence of a call, it had no way to determine the water needs of downstream senior water rights. **See Tr. Pg. 1077, Lns. 11-18.** Also, there is currently no Watermaster for the Brazos River. So water rights are only enforced when there is a priority call by TCEQ.

E. Beneficial Use

BRA contends that based on the information contained in the Application, and the related modeling, the Commission is capable of evaluating the “factors set out in Texas Water Code § 11.134 and issuing a final order on the application.” **See BRA's Exceptions at 15.** BRA is seeking a permit for 188,005 af/y. The evidence in the hearing regarding the location of diversions under BRA's SysOp Permit Application indicates that the amount BRA will actually be able to divert is 132,405 af/y year. BRA

did not provide evidence that it would beneficially use the 55,600 af/y that is unavailable because of the location of BRA's long-term water commitments. Also, the water that will be unavailable to BRA, because the storage available to the proposed new water right is less than what is used in BRA's water availability model, will be appropriated to BRA, but not beneficially used. This violates TEX. WATER CODE § 11.134 (B) (3)(A).

F. Public Welfare

It is Dow's position that the proposed Application, because it makes at least 88,600 af/y of firm yield water in the Brazos River Basin unusable, is detrimental to the public welfare. BRA had the burden to show that the Application was not detrimental to the public welfare under TEX. WATER CODE § 11.134(b)(3)(C). Neither the issuance of an interim order, nor any other proposed future action in this docket will resolve this problem. BRA's Application under BRAs proposed procedure would violate the public welfare provision of TEX. WATER CODE § 11.134 in that BRA would remove from potential third parties 88,600 af/y without showing any benefit to anyone. Certainly, appropriating water that is not useful to the appropriator, but eliminates it from the inventory of unappropriated water, is contrary to the public welfare.

IV. COMBINING FIRM AND INTERRUPTIBLE WATER

BRA states that it "would prefer that the values from its draft be utilized and that the determination of firm/interruptible water be deferred to the WMP." *See BRA's Exceptions at 9.* Although Dow does not believe that this matter should proceed further, in the event that this matter results in a permit, Dow believes that the firm and interruptible water appropriated should be separately stated in the permit, as in the ED's draft permit. *See ED Exhibit K2 at 6.* This is a very complicated water right with a lot

of moving parts. **Tr. Pg. 573, Ln. 17 – Pg. 574, Ln. 5.** More detail in the permit would facilitate management of water rights in the Brazos River Basin and tend to provide better protection for senior water rights.

V. ALLENS CREEK

The ED states that “[i]ncreasing the run of the river diversion above the Allen’s Creek permit, which is not before the Commission, would need to be amended to make this change.” **See ED’s Exceptions at 4.** Although Dow does not believe that this matter should proceed further in the event that this matter results in a permit, Dow agrees with the ED’s position that the amount of water authorized for diversion by the Allens Creek permit cannot be appropriated for the SysOp Permit without an amendment to the Allens Creek permit. The ALJs assert that “BRA’s existing excess flows permit already authorizes BRA to divert excess Brazos River flows into [Allens Creek Reservoir].” **See PFD at 174.** However, the excess flow permit specifically states that “[a]ll water diverted and used under this Certificate of Adjudication must be allocated to the reservoir operated under the Brazos River Authority’s System Operation Order, which has the most senior water right and still has priority right water unused for the calendar year. Water so allocated must be subtracted from that reservoir’s available priority water right.” **See Exhibit Dow 42, Special Conditions 4A.** Based on this condition, the ED correctly states that “Allen’s Creek reservoir is not part of the existing system operation order and, even if it were, diversions under the excess flows authorization would need to be deducted from, not added to the Allen’s Creek permit.” **See ED’s Exceptions at 8.**

VI.
TRANSCRIPT COSTS

The Commission should accept the ALJs' recommendation to require BRA to pay the transcript cost. *See PFD at 193.* The fact that this hearing is futile is a direct result of the overreaching nature of BRA's Application.

VII.
CONCLUSION

BRA failed to meet its burden to prove that the proposed appropriation meets the requirements of TEX. WATER CODE §11.034 [and other provisions]. The only option that the TCEQ has under the circumstances is to deny the Application.

VIII.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Dow prays that the TCEQ deny this Application in its entirety. Dow further requests that all costs be assessed against BRA and that Dow be granted all such other relief as it may be entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of The Dow Chemical Company's Response to Exceptions to the Proposal for Decision was forwarded via e-mail and/or first-class mail to the parties below on this 17th day of November, 2011.



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